Supreme Court, U.S.
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No. 00-1940

In The

Supreme Court of the United States

RICHARD E. FINLAN,

Petitioner,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT, SANDY KRESS, CHAD WOOLERY, HOLLIS BRASHEAR, WILLIAM KEEVER, LYNDA McDOW, KATHLEEN LEOS, YVONNE EWELL, LARRY FRIEDMAN, ALAN RICH, FRIEDMAN & ASSOCIATES, P.C., DENNIS EICHELBAUM, and SCHWARTZ & EICHELBAUM, P.C.,

Respondents.

On Petition For A Writ Of Certiorari To The Texas Supreme Court

RESPONDENTS SCHWARTZ & EICHELBAUM, P.C. AND DENNIS EICHELBAUM'S RESPONSE TO FINLAN'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The state court of appeals below concluded that the filing of the DISD conspiracy lawsuit against Finlan did not violate his First Amendment rights. The DISD conspiracy claims were based on Finlan's alleged conduct of conspiring with others to defraud the DISD by obtaining a consent judgment against the DISD. The state court of appeals concluded that the summary judgment evidence raised fact issues on whether Finlan conspired to defraud the DISD. By so concluding, the court of appeals necessarily confirmed that the DISD had probable cause to bring the conspiracy lawsuit against Finlan. The existence of probable cause to bring the DISD conspiracy lawsuit against Finlan provides independent and adequate state grounds to support summary judgment against Finlan. As such, does this Court have jurisdiction?

2. The final judgment, if any, subject to review by writ of certiorari is that of the state court of appeals. In his petition for writ of certiorari to this Court, Finlan has sought review of the Texas Supreme Court's discretionary denial of his petition for review to that court. Because he has failed to seek review of the state court of appeals' judgment, does this Court have jurisdiction?

3. The Lawyer Defendants[1] sought and were granted summary judgment on two grounds: (1) the merits of Finlan's § 1983 claims, and (2) the defense of

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[1] Respondents Schwartz & Eichelbaum, P.C., and Dennis Eichelbaum are referred to herein as the "Lawyer Defendants."

QUESTIONS PRESENTED – Continued

qualified immunity. The state court of appeals affirmed the summary judgment *in toto*, although it did not reach the issue of qualified immunity. Here, Finlan has not challenged the summary judgment in favor of the Lawyer Defendants on immunity grounds. Because there exists an independent basis for affirmance of the judgment below and because Finlan has not challenged that independent basis, should this Court deny petition?

4. Does this Court's holding in *Albright v. Oliver* – not cited or discussed in Finlan's Petition – preclude Finlan from claiming that he had "substantive Fourteenth Amendment rights" that were violated by acts of the Respondents?

5. Did the state court of appeals correctly conclude that the filing of the civil lawsuit in question against Finlan was not a constitutional violation?

6. Doesn't *Paul v. Davis* and the Fifth Circuit's *Colson v. Grohman* provide an alternative ground to support the decision below?

7. Doesn't Rule 13 of the Texas Rules of Civil Procedure comply with the requirements of the *Parratt/Hudson* Doctrine so that Finlan cannot assert claims under § 1983?

8. Can Finlan claim that the filing of the DISD's September 13, 1995 lawsuit against him was in retaliation for the exercise of his First Amendment rights when the Texas Court has concluded that machinations between

QUESTIONS PRESENTED – Continued

Finlan, Ed Grant and others in the "162nd Civil Rights Lawsuit" are the "basis" for the DISD lawsuit?

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I. THE PETITION SHOULD BE DISMISSED FOR LACK OF JURISDICTION

A. Judgment Based on Independent and Adequate State Grounds.

The judgment of the court below is based on independent and adequate state grounds; therefore this Court lacks jurisdiction. *E.g., Black v. Cutter Laboratories,* 351 U.S. 292, 297-98 (1956); *Herb v. Pitcairn,* 324 U.S. 117, 125 (1945). When the DISD sued Finlan, et al., in September 1995, Finlan quickly filed his § 1983 counterclaim charging that the suit was filed in retaliation for his exercise of First Amendment rights. The court below not only held Finlan's rights had not been violated by the filing of the lawsuit (27 S.W.3d at 240-44), it effectively confirmed that the DISD had probable cause to make the filing and reversed the trial court's summary judgment in Finlan's favor:

> We conclude DISD's evidence raises fact questions concerning the alleged agreement among Finlan, Venable, and Grant to defraud DISD by obtaining consent judgments against DISD regardless of the merits of Finlan's and Venable's civil rights suit in the 162nd District Court and to collect the judgments from the TASB.

(27 S.W.3d at 232).

DISD's probable cause obviously inures to the Lawyer Defendants. Because there exist independent and adequate state grounds to support the judgment below, Finlan's petition should be dismissed for lack of jurisdiction.

B. Finlan Seeks Certiorari And Review of Decision of Wrong Court.

It is the opinion of the Texas court of appeals, the Fifth District Court of Appeals at Dallas, which would, if at all, be subject to review.[2] After that opinion was rendered, Finlan filed a Petition for Review with the Texas Supreme Court, which was denied. (Appendix 1). Rule 56.1(a) of the Texas Rules of Appellate Procedure provides that when a petition for review is filed with the Texas Supreme Court, whether to grant review is a matter of "judicial discretion." The final judgment subject to review here is that of the Texas court of appeals; Finlan has sought review of the discretionary denial by the Texas Supreme Court of his petition for review. As such, his Petition should be denied for want of jurisdiction. *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U.S. 157 (1954).

II. FEDERAL STATUTE INVOLVED: SECTION 1983

Finlan's action below was predicated upon an asserted violation of 42 U.S.C. § 1983, not on a direct violation of the First Amendment. Section 1983 provides, in pertinent part, as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any

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[2] The Opinion of the Dallas Court of Appeals, *DISD v. Finlan*, 27 S.W.3d 220 (Tex. App. – Dallas 2000, pet. denied) can be found at Finlan Appendix 1.

> citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

III. STATEMENT OF THE CASE

The Lawyer Defendants object to Finlan's "Statement of the Case." Finlan is correct that in the early '90s, he made a number of allegations of improprieties concerning the DISD's handling of its bond funds. And, along with his then cohort, Don Venable, filed a lawsuit based on those allegations. This led to the appointment of the Texas Commissioner of Education as Master and his hiring of Deloitte & Touche. The accounting firm's report did reveal shortcomings in the DISD's accounting records, but nothing like the massive frauds asserted by Finlan.

The "Background" section of the Opinion of the state court of appeals below, found at 27 S.W.3d at 230 (pp.12-13 of Finlan's Appendix), reveals the following:

a. The DISD sued Finlan and Venable in October 1992 "for tortious interference with the relationship and contract between the board and Goldman, Sachs & Company" (the "1992 DISD Tortious Interference Lawsuit").

b. In response to the "1992 DISD Tortious Interference Lawsuit," Finlan and Venable filed (i) a civil rights counterclaim against the DISD, and (ii) in 1994, a civil rights lawsuit against Respondents in the 162nd Texas District Court (the "162nd Civil Rights Lawsuit").

c. Ed Grant, who had been a DISD Trustee and was named as a counterdefendant in the "1992 DISD Tortious Interference Lawsuit" and as a defendant in the "162nd Civil Rights Lawsuit," confessed judgment on Finlan's § 1983 claims, retained Venable's lawyer, Ron Hinds, to represent him in a crossclaim against the DISD lawyers who had advised that the "1992 DISD Tortious Interference Lawsuit" be filed, and, together with Finlan, "presented an agreed judgment in favor of Finlan for $300,000 to the judge who signed it."

However, it is important to note that the filing by the DISD of the 1992 DISD Tortious Interference Lawsuit (as well as the other matters Finlan recites which relate to that lawsuit) is not a basis for the § 1983 claims which Finlan brought in this case. The court of appeals' Opinion specifically describes the two lawsuits filed by the DISD (or its Trustees) against Finlan which Finlan claimed were retaliatory and which form the basis of Finlan's § 1983 claims in this case:

(1) A September 6, 1995 declaratory judgment action against Finlan regarding disclosure of the DISD Trustees' campaign finance reports; and

(2) A September 13, 1995 amended petition (in the same declaratory judgment action) against Finlan, wherein the DISD alleged that Finlan, as a result of the "agreed judgment" in the 162nd Civil Rights Lawsuit, had conspired to defraud the DISD and its taxpayers.

(27 S.W.3d at 240-41).

Thus, despite Finlan's reference to the 1992 Tortious Interference Lawsuit, it did not form a basis of his complaints in this case.

Although Finlan references the matters described in a. through c. above, he fails to inform this Court what happened to his claims in the 1992 DISD Tortious Interference Lawsuit and to Finlan's and Venable's claims in the 162nd Civil Rights Lawsuit. After the DISD's petition was dismissed, the parties to the 1992 litigation were realigned with the counterclaimants becoming plaintiffs. The 162nd Civil Rights Lawsuit was consolidated with the 1992 suit which was then pending in the 101st Texas State District Court. (DISD Appendix 1). Summary Judgment was granted to the DISD and the DISD Respondents on Finlan's and Venable's § 1983 claims by Order dated July 26, 1999. (DISD Appendix 2). On June 19, 2000, Final Judgment was entered confirming the earlier grant of summary judgment and granting summary judgment to the Lawyer Defendants. (DISD Appendix 6). Finlan has perfected an appeal which pends before the Court of Appeals for the Eleventh District of Texas (at Eastland, Texas).

On page 6 of the Petition, Finlan tells of his request to superintendent Woolery to provide copies of campaign finance information of the school board members. This resulted in the DISD's filing the September 6, 1995 declaratory judgment suit against him and Venable, who had made a similar demand. This filing, of course, drew a § 1983 counterclaim by Finlan which was later expanded to include Finlan's § 1983 counterclaim that the filing of

the RICO lawsuit against him also violated his constitutional rights. These are the claims involved in the case at bar.

However, Venable filed a separate lawsuit in federal court claiming that the September 6th filing violated § 1983. After summary judgment was granted to the defendants (DISD Appendix 11), Venable did not pursue his claims relating to the September 6th filing. He did appeal another asserted § 1983 violation relating to a bond forfeiture proceeding. The Fifth Circuit, in a per curiam opinion, found that this appeal "is without arguable merit and is frivolous" and ordered it dismissed. (DISD Appendix 17).

Another related lawsuit began with the filing in 1994 by Finlan and Venable of a declaratory judgment action against William Keever, then a DISD Trustee, seeking his campaign finance records. Keever filed a declaratory judgment counterclaim that those records were not covered by the Open Records Act. This counterclaim provoked § 1983 counterclaims by Finlan and Venable against Keever and his lawyers which were removed to federal court. After summary judgment was granted to the defendants, Finlan perfected an appeal to the Fifth Circuit which found that his appeal "is without arguable merit and is frivolous" and ordered it dismissed. (DISD Appendix 19).

Finally, Finlan's characterization of the state court of appeals Opinion is erroneous. Finlan argues:

> The Dallas Court of Appeals decided Finlan's case on the threshold issue of standing, taking the position that Finlan had no right to be free

> of government retaliation and that his suit should be dismissed.

(Finlan's Petition at 8).

Finlan is incorrect. The Dallas Court of Appeals affirmed summary judgment in favor of the Lawyer Defendants on the merits. (27 S.W.3d at 244-45).

IV. FINLAN HAS FAILED TO CHALLENGE, IN THIS COURT, INDEPENDENT GROUNDS WHICH ALLOWED AFFIRMANCE OF THE JUDGMENT BELOW

In the trial court, the Lawyer Defendants moved for summary judgment on the merits of Finlan's civil rights claim, ***and*** on the Lawyer Defendants' defense of qualified immunity. (27 S.W.3d at 220, 241). The trial court granted the Lawyer Defendants' motion for summary judgment against Finlan's civil rights claims. (27 S.W.3d at 220). Finlan challenged both grounds in appealing the summary judgment. (27 S.W.3d at 240-41, 244)(Finlan's Cross-Point Five). The Court of Appeals affirmed the summary judgment in favor of the Lawyer Defendants without reaching the propriety of their summary judgment motion on qualified immunity grounds.

Even though the state court of appeals did not reach the issue of the Lawyer Defendants' qualified immunity, it nonetheless affirmed the trial court's grant of summary judgment – which was based on two independent grounds: (1) the merits of Finlan's § 1983 claims, and (2) the Lawyer Defendants' qualified immunity defense. In his Petition to this Court, Finlan does not challenge the grant of summary judgment in favor of the Lawyer

Defendants on the basis of qualified immunity. Because Finlan has failed to challenge an independent basis in support of the summary judgment below, Finlan's Petition should be summarily denied.

In the alternative, and without waiving the foregoing, the Lawyer Defendants were entitled to summary judgment on qualified immunity for the same reasons set forth in the Opinion of the court of appeals below. (27 S.W.3d at 242-45)("Accordingly, we hold that in 1995 there was no clearly established law that the filing of a civil suit in retaliation violated an individual's free speech right."); *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987) and *Foster v. City of Lake Jackson*, 28 F.3d 425, 429 (5th Cir. 1994) (analysis of what constitutes "clearly established"); *Kerr v. Lyford*, 171 F.3d 330, 342-43 (5th Cir. 1999) (J. Jones concurring opinion); *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982); *Cullinan v. Abramson*, 128 F.3d 301, 310 (6th Cir. 1997), *cert. den.*, 523 U.S. 1094 (1998) (private attorney working on behalf of city is entitled to qualified immunity).

V. FINLAN HAS NOT ALLEGED A DEPRIVATION OF A CONSTITUTIONAL RIGHT

This Court has stated:

> The first inquiry in any § 1983 suit, therefore, is whether the plaintiff has been deprived of a right "secured by the Constitution and laws." If there has been no such deprivation, the state of mind of the defendant is wholly immaterial.

Baker v. McCollan, 443 U.S. 137, 140 (1979). The state court of appeals correctly concluded that there was no violation

of § 1983 committed by the filing of the civil lawsuit. (27 S.W.3d 220, 244)("We have held the filing of the civil case was not a constitutional violation."). Moreover, despite Finlan's argument, there is no conflict between the decision below and any of the decisions of this Court which Finlan discusses, quotes or cites in his Petition.

There is one decision of this Court – *Albright v. Oliver*, 510 U.S. 266 (1994) – that is on point. The decision below is completely compatible with *Albright*, and is, through its reliance on *Johnson v. Louisiana Dep't of Agriculture*, 18 F.3d 318 (5th Cir. 1994), derived from *Albright*. Finlan does not cite *Albright*.

Petitioner's claim in *Albright* was that "the action of respondents (in prosecuting criminal charges against him) infringed his substantive due process right to be free of prosecution without probable cause." (510 U.S. at 271). Here, Finlan argues that the action of Respondents violated his "substantive Fourteenth Amendment rights" (Petition p. 19) by the filing of the civil claims – regardless of whether or not there was probable cause. Obviously the four members of the *Albright* plurality are not going to extend "the protections of substantive due process" to Finlan's complaints about a civil proceeding. (*Id.* at 271-72).

Justice Scalia, concurring, "reject(s) the proposition that the Due Process clause guarantees certain unspecified liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty." (*Id.* at 275). By so doing, he rejects Finlan's claim here. Justice Ginsburg agreed that Albright's claim is "properly analyzed under the Fourth Amendment rather

than under the heading of substantive due process." (*Id.* at 276). Further, there was not a seizure of Finlan here as there was of Albright, which made the difference between her analysis and that of the plurality. Justice Kennedy's concurrence – joined by Justice Thomas – agrees that Albright's claim "must be analyzed under the Fourth Amendment without reference to more general considerations of due process." (*Id.* at 281). Justice Souter also agreed that "petitioner has not justified recognition of a substantive due process violation in his prosecution without probable cause." (*Id.* at 286). Lastly, Justice Stevens' dissent – in which Justice Blackburn joined – provides no solace to Finlan in that its analysis is derivative of the principle that "The Fifth Amendment to the Constitution constrains the power of the Federal Government to accuse a citizen of an infamous crime." (*Id.* at 291).

In summary, Finlan can find no support in any of the *Albright* opinions for his claim of a violation of substantive due process. Worse for him, the plurality and concurring opinions are fatal to his position.

At the Circuit level, there are a number of cases that hold that there is no violation of § 1983 presented by the filing of a civil lawsuit or counterclaim. Among other Fifth Circuit opinions finding no violation of § 1983 in the filing of civil litigation by a governmental entity are *Whittington v. Johnston*, 201 F.2d 810 (5th Cir. 1953); *Curry v. Ragan*, 257 F.2d 449 (5th Cir.), *cert. den.*, 35 U.S. 851 and *reh den.*, 358 U.S. 914 (1958); *Beker Phosphate Corp. v. Muirhead*, 581 F.2d 1187 (5th Cir. 1978); *Whatley v. Philo*, 817 F.2d 19 (5th Cir. 1987); and, of course, *Johnson v. Louisiana Dep't of Agriculture*, 18 F.3d 318 (5th Cir. 1994).

Among other circuits that have reached a similar conclusion that the filing of a civil lawsuit does not implicate § 1983 are *Moffett v. Commerce Trust Co.*, 187 F.2d 242 (8th Cir. 1951); *Bell v. School Bd. of City of Norfolk*, 734 F.2d 155 (4th Cir. 1984); *Paskaly v. Seale*, 506 F.2d 1209 (9th Cir. 1974); *Bottone v. Lindsley*, 170 F.2d 705 (10th Cir. 1948). *See also Bradford v. Lefkowitz*, 240 F. Supp. 969, 977 (S.D.N.Y. 1965) ("Neither the Fourteenth Amendment nor the Civil Rights Act purports to secure a person against unfounded or even malicious claims or suits in state courts, especially when the laws and courts of the state are available and furnish adequate remedies to a person aggrieved."). *See generally* ANNOTATION, ACTIONABILITY OF MALICIOUS PROSECUTION UNDER 42 USCS § 1983, 79 A.L.R. Fed. 896 (1986).

Of the score or more Circuit cases cited by the Petition, only three – not counting *Johnson v. LDOA* – were concerned with malicious prosecution issues. In *Harrison v. Springdale Water & Sewer Comm.*, 780 F.2d 1422 (8th Cir. 1986) the counterclaim by the government actors sought to condemn Harrison's property; a recorded *lis pendens* accompanied the filing of the lawsuit. As the Eighth Circuit observed:

> The real gist of the Harrisons' complaint is found in the statement that "if public officials are allowed to use that power [of eminent domain] to punish those who seek protection in the courts, then the courts and justice will be denied to many citizens."

(*Id.* at 1428).

In contrast to the situation here, the condemnation suit in *Harrison* worked a deprivation of property which was undertaken for the admitted purpose of coercing a

sale of the property at the city's price. Moreover, this decision predates *Albright*. The issue before the Second Circuit in the second case, *Greenwich Citizens Comm. v. Counties of Warren*, 77 F.3d 26 (2nd Cir. 1996), was whether the trial court erred in not requiring a finding that either (a) the counterclaims were filed in "retaliation" for exercise of First Amendment rights, or (b) were filed as "a legitimate response to litigation." (p. 31) That opinion was predicated on the assumption that a § 1983 violation could be based on the filing of a civil lawsuit by government actors; it never tested or addressed the correctness of such assumption. Although decided subsequently to *Albright*, it nowhere cites or considers *Albright*. The third case, *Rolf v. City of San Antonio*, 77 F.3d 823 (5th Cir. 1996) was similar to *Harrison* in that condemnation of plaintiff's land was sought – a deprivation of a property interest. Neither was *Albright* cited in *Rolf*. Under the Fifth Circuit's intra-circuit stare decisis rule, the *Rolf* panel was bound by *Johnson v. LDOA*; obviously the condemnation element of *Rolf* distinguished it from both *Albright* and *Johnson v. LDOA*.

The case most clearly on point is the case most relied upon by the court below, *Johnson v. LDOA*.[3] The Fifth Circuit opinion followed soon after this Court had handed down *Albright*. There, Johnson claimed that retaliatory administrative actions were lodged against him for

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[3] The Sixth Circuit's decision in *Cullinan v. Abramson*, 128 F.3d 301 (6th Cir. 1997), *cert. den.*, 523 U.S. 1094 (1998) is in complete accord with *Johnson v. LDOA*. There, the court reversed the denial of summary judgment on qualified immunity grounds after finding that no reasonable official would have believed he was violating clearly established rights by the filing of a retaliatory lawsuit.

not making "a large enough contribution" to the Commissioner's reelection campaign and that there were "coercive attempts to stifle him in his free expression of speech." (18 F.3d at 320). The Court agreed with the district court that, if there were a § 1983 claim asserted, it was "one for malicious prosecution in violation of Johnson's First Amendment rights." (*Id.*). It immediately adds, "Whether the Constitution comprehends any such claim is far from clear." The court made clear (*Id.* at 321, fn. 2.) that prior to *Albright*, the Fifth Circuit had generally held malicious prosecution in criminal proceedings were "serious enough" to be actionable under § 1983, but not those in civil proceedings. Finlan ignores this and illogically argues that *Johnson v. LDOA* should be read as suggesting that claims of civil malicious prosecution are more serious than criminal malicious prosecutions.

Finlan to the contrary, for an administrative proceeding which resulted in sanctions and, *a fortiori*, for a purely civil action, the Fifth Circuit requires that, "at the very least" a § 1983 claimant must "establish all elements of the common law tort action." (*Id.* at 320). The court below's reversal of summary judgment for Finlan on the civil conspiracy claim (28 S.W.3d at 229-32) established probable cause and negated one essential element of Finlan's malicious prosecution cause of action. More importantly for the "deprivation" requirement of § 1983, Finlan fails to allege facts to establish a second element of a common law malicious prosecution claim, that of special damage or special injury through some physical interference with the party's person or property in the form of an arrest, attachment, injunction or sequestration. *See Texas Beef & Cattle Co. v. Green*, 921 S.W.2d 203, 209 (Tex. 1996).

Johnson v. LDOA was the first in what is an ever-expanding universe of circuit cases attempting to apply *Albright* to § 1983 claims bottomed on an alleged malicious prosecution. However, there is no conflict or confusion among the Circuits that in any way conflicts with the decision below. Some, like *Johnson v. LDOA* (and the court below), require that all of the elements of a common law malicious prosecution claim must be established.[4] Others require establishing such elements – and more.[5] But all hold that, unless a lack of probable cause can be established[6] and unless there was a "seizure,"[7] there can be no § 1983 cause of action. Finlan's § 1983 claims do not contain either the seizure element or the lack of probable cause element.

The court below was also correct in its consideration and application of relevant Fifth Circuit authorities to Finlan's claim that his right to access the courts had been illegally infringed upon. The court correctly cited and quoted *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 (5th Cir. 1994) for the proposition that such right of access is implicated only "where the ability to file suit was delayed, or blocked altogether." (27 S.W.3d at 244). And, likewise with respect to *Hale v. Townley*, 45 F.3d 914, 920

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[4] *E.g., Cervanates v. Jones*, 188 F.3d 805, 808-09 (7th Cir. 1999), *cert. den.*, 528 U.S. 1154, 145 L.Ed.2d 1071 (2000).

[5] *E.g., Lambert v. Williams*, 223 F.3d 257, 261 (4th Cir. 2000), *cert. den.*, 121 S.Ct. 889, 148 L.Ed.2d 797 (2001).

[6] *E.g., Taylor v. Meacham*, 82 F.3d 1556, 1561-62 (10th Cir. 1996), *cert. den.*, 519 U.S. 871.

[7] *E.g., Britton v. Maloney*, 196 F.3d 24, 29 (1st Cir. 1999), *cert. den.*, 530 U.S. 1204, 147 L.Ed.2d 234 (2000).

(5th Cir. 1995), to the effect that government's filing of civil suit is not an "official impediment" to the "facilitative right to institute a suit." *Id.*[8]

Further support for the court below can also be found in *Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989), *cert. den.*, 496 U.S. 924 (1990). There, the court was asked to adopt the Eighth Circuit's holding in *Harrison v. Springdale Water & Sewer Comm.*, cited *supra*, that the filing of the retaliatory counterclaim stated a cause of action for infringement of the constitutional right of access to the courts. The Fifth Circuit expressly declined to approve or disapprove such holding. (884 F.2d at 812-13 fn. 9). Therefore, it has not been established in Fifth Circuit jurisprudence that there exists a constitutional right of access to the courts as Finlan would frame such right.

The court below is eminently correct in its holding that "the filing of the civil case was not a constitutional violation. . . . " (27 S.W.3d at 244).

VI. *PAUL V. DAVIS* AND *COLSON V. GROHMAN* PROVIDE ALTERNATIVE GROUNDS OF SUPPORT FOR THE OPINION BELOW

This Court, in *Paul v. Davis*, 424 U.S. 693 (1976), rejected a § 1983 claim based on the distribution of flyers

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[8] In addition, the Court below noted that Finlan did not allege or establish that his ability to file suit was in any way delayed or blocked altogether. Rather, the Court noted that Finlan has been a frequent party to litigation against the DISD Trustees. (27 S.W.3d at 244).

by the police which had plaintiff's picture on them and identified him as a shoplifter when he had been arrested, but not prosecuted, for such crimes. In essence, *Paul v. Davis* held that, without more, injury to reputation does not implicate a protected liberty or property interest. *Id.* at 711-12. Such "reputational damages" are all the injury that Finlan asserts here. Other courts have recognized that the mere filing of a lawsuit is not essentially different from the "reputational damages" visited by the defamation of a false accusation. *See Albright v. Oliver*, 975 F.2d 343, 345-46 (7th Cir. 1992) (If the injuries[9] that defamation imposes do not constitute a deprivation of liberty or property within the meaning of the due process clause, then neither do the injuries that malicious prosecution imposes). *Smart v. Bd. of Trustees of University of Illinois*, 34 F.3d 432, 434 (7th Cir. 1994) (If liberty is not at stake, it is difficult to see how either tort [malicious prosecution or the use of process] could be thought to invade an interest protected by the due process clause (life, liberty, property) merely by virtue of its effect upon the reputation, or, like any suit, the pocketbook of the defendant).

In a later Seventh Circuit case, *Spiegel v. Rabionovitz*, 121 F.3d 251 (7th Cir. 1997), the plaintiff claimed § 1983 damages due to his eviction, his adverse employment status and loss of income. The district court found that Spiegel's eviction was a probable consequence of his

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[9] The court noted that such injuries could include embarrassment, outrage, and the undermining of one's ability to make favorable transactions (business or personal) which thereby subjects one to pecuniary and non-pecuniary costs. *Albright*, 975 F.2d at 345-46. Of course, this is no different than Finlan's argument herein.

malicious prosecution. The Seventh Circuit disagreed and reversed:

> Although Spiegel's circumstances are unfortunate, the rationale of *Smart* instructs that none of them are deprivations of property of a constitutional magnitude.

(*Id.* at 256). Finlan's nearly identical claimed damages are likewise not deprivations.

The Fifth Circuit's opinion in *Colson v. Grohman*, 174 F.3d 498 (5th Cir. 1999) is likewise fatal to Finlan's § 1983 claims. Finlan's claims here are

> . . . inconsistent with our recent case law unequivocally holding that retaliatory criticisms, investigations, and false acquisitions that do not lead to more tangible adverse action are not actionable under § 1983.

(*Id.* at 513). The "recent case law" and sole authority cited in support of that statement in the accompanying footnote 8 is *Johnson v. LDOA*, which is said to be "consistent with our general rule that the plaintiff must cross a certain threshold of harm before she can bring a claim for First Amendment retaliation." (*Id*). The opinion concludes that Colson "has not alleged any First Amendment *deprivation* actionable under § 1983." (*Id.* at 514 – emphasis supplied). Citing *Paul v. Davis*, the opinion further concludes that there was no infringement as to "her Fourteenth Amendment due process claim" – described as resting "on a theory that she suffered harm to her reputation coupled with the denial of her constitutional rights to be without retaliation." (*Id*). Finlan is in no different position than Colson. He is not entitled to a recovery under § 1983.

VII. ANOTHER SUPPORTING AUTHORITY: THE *PARRATT/HUDSON* DOCTRINE

As discussed hereinabove, the filing of the civil suit against Finlan did not violate his First Amendment rights or his Fourteenth Amendment substantive due process rights. To the extent Finlan argues that his procedural due process rights were violated, such an argument should be flatly rejected under the *Parratt/Hudson* doctrine.[10] Rule 13 of the Texas Rules of Civil Procedure[11] is the state law analogue of Rule 11 of the Federal Rules of Civil Procedure. Through it, Texas has provided a process through

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[10] *See Hudson v. Palmer*, 468 U.S. 517 (1984); *Parratt v. Taylor*, 451 U.S. 527 (1981) (where state provides adequate post-deprivation remedy, no procedural due process rights are violated).

[11] Rule 13 provides, in relevant part:

> The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment. Attorneys or parties who shall bring a fictitious suit as an experiment to get an opinion of the court, or who shall file any fictitious pleading in a cause for such a purpose, or shall make statements in pleading which they know to be groundless and false, for the purpose of securing a delay of the trial of the cause, shall be held guilty of a contempt. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, after notice and hearing, shall impose an appropriate sanction available under Rule 215-2b, upon the person who signed it, a represented party, or both.

which Finlan could seek redress for any claimed injury occasioned to him by the DISD's filing of the lawsuit against him. Rule 13 clearly meets the *Parratt/Hudson* requirement of a state-provided adequate post-deprivation remedy. *See also, Charbonnet v. Lee*, 951 F.2d 638, 644 (5th Cir. 1992). The *Parratt/Hudson* doctrine provides yet one more reason why Finlan's writ should be denied.

VIII. CONCLUSION

The Lawyer Defendants respectfully request that this Court note its lack of jurisdiction and dismiss Finlan's Petition, or, in the alternative, deny Finlan's Petition.

Respectfully submitted,

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RE: Case Number 00-1191
Court of Appeals Number: 05-97-00734-CV
Trial Court Number: 97-00392-H

Style: RICHARD E. FINLAN

v.

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[SEAL] **THE SUPREME COURT OF TEXAS**
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Dear Counsel:

Today, the Supreme Court of Texas denied the two petitions for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Tanya R. Hunter
Tanya R. Hunter, Deputy Clerk

cc: Ms. Lisa Matz, Clerk
Mr. Jim Hamlin
Mr. Richard E. Finlan
Mr. Ed Grant